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No. 92-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES SCULLY, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

ANGEL CLAUDIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD A. BROWN
District Attorney, Queens County

BARBARA D. UNDERWOOD*
JOHN M. CASTELLANO
Assistant District Attorneys

Queens County District Attorney's Office
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-6314

**Counsel of Record for the Petitioner*

March 29, 1993

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in creating an exception for pretrial appeals to the rule of *Ross v. Moffitt*, 417 U.S. 600 (1974), which holds that the federal right to effective appellate counsel does not apply to second-level discretionary appeals.

2. Whether any such exception to the rule of *Ross v. Moffitt* would constitute a new rule barred by *Teague v. Lane*, 489 U.S. 288 (1989), in this federal *habeas corpus* proceeding.

3. Whether the Second Circuit erred in finding appellate counsel constitutionally deficient for failing to raise a state law claim on a state appeal, when there was substantial state precedent against the omitted claim.

4. Whether the extension of the right to counsel to cover such omissions of state law claims is a new rule barred by *Teague v. Lane*, 489 U.S. 288 (1989).

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OCTOBER TERM, 1992

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Greenhaven Correctional Facility, et al.,

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—v.—

ANGEL CLAUDIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Charles Scully, Superintendent of the Greenhaven Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on December 28, 1992, directing the district court to grant the petition for a writ of *habeas corpus* "unless the state affords Claudio an opportunity to present [his] state law claim to the New York Court of Appeals within sixty days from the date of our mandate." The petitioner is represented in this proceeding by the District Attorney of Queens County, New York, by agreement with the Attorney General of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 982 F.2d 798 (Oakes and Pierce, JJ.; Newman, J., dissenting), and is reprinted in the appendix to this petition at p. 2a, *infra*. The order of the Court of Appeals for the Second Circuit denying rehearing or rehearing *in banc* is reprinted in the appendix at p. 1a, *infra*.

The memorandum decision of the United States District Court for the Southern District of New York (Korman, J.) has not been reported. It is reprinted in the appendix at p. 36a, *infra*.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On April 30, 1992, the Eastern District denied the petition for a writ of *habeas corpus*. Pet. App. 36a.

On December 28, 1992, the Second Circuit entered a judgment and an opinion reversing that decision and remanding the case to the district court, with directions to grant the petition unless the state affords Claudio an opportunity to present his state law claim to the New York Court of Appeals within sixty days from the date of the mandate. Pet. App. 2a.

On January 25, 1993, the Court of Appeals for the Second Circuit granted the state's motion for permission to file a petition for rehearing out of time, and on February 25, 1993, the Court denied that petition. Pet. App. 1a.

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 20.4

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the Constitution of the United States provide respectively, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.
>
> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At about 4:00 a.m. on May 15, 1980, Angel Claudio (hereinafter defendant) killed Stephen Zweikert by shooting him in the chest. Defendant and Zweikert were each sixteen years old. Claudio and three companions were attempting to rob Zweikert as he came out of a subway station in Queens County, New York, on his way home from a high school prom. Defendant and his friends fled the scene.

On May 19, in the course of police efforts to find the people who killed Stephen Zweikert, defendant was questioned by the police and denied any involvement in the crime. Nevertheless, the police continued to receive information pointing to defendant.

On May 21, defendant called attorney Mark Heller, whose name he found in the yellow pages of the telephone directory. He met with Heller on May 22 and retained him. After a discussion, Heller advised defendant to turn himself in to the Queens District Attorney and to hope that the surrender would lead to leniency. Heller then drove defendant to the District Attorney's Office. The District Attorney told Heller there would be no plea bargain, and also told Heller that without a confession there was insufficient evidence to charge defendant with the murder. Heller did not relay this information to defendant, but instead advised defendant to make a statement.

In the presence of his attorney, and after receiving *Miranda* warnings, defendant explained that he wanted to confess because he was so troubled that he was unable to eat or sleep. He then stated that he pointed a gun at Zweikert while his friends demanded money, that Zweikert tried to grab the gun, and that it accidentally discharged, killing Zweikert.

Defendant was then arrested and charged with attempted robbery, felony-murder, and criminal possession of a loaded firearm.

State Court Proceedings

Before trial, the court appointed attorney Albert Gaudelli to represent defendant. Gaudelli moved to suppress defendant's statement on the ground that Heller's advice did not satisfy reasonable standards of attorney competence, and therefore the statement had been taken in violation of defendant's Sixth Amendment right to the effective assistance of counsel. After a hearing, the court granted that motion.

The state then took an appeal as of right to the Appellate Division, and that court reversed, holding that the Sixth Amendment right to counsel had not yet attached at the time the statement was taken. The Appellate Division then went on to opine that Heller's conduct also did not violate the defendant's right to counsel under the state constitution. *People v. Claudio*, 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dept. 1982); Pet. App. 61a.

Defendant then sought and obtained permission to appeal to the New York Court of Appeals. That Court affirmed the Appellate Division's holding that there was no violation of the Sixth Amendment right to counsel, and declined to reach the question of defendant's state constitutional right, because defendant had never raised the state constitutional claim in any state court. *People v. Claudio*, 59 N.Y.2d 556, 466 N.Y.S.2d 271 (1983); Pet. App. 49a.

After a jury trial, defendant was convicted of murder, attempted robbery, and possession of a weapon. The conviction was affirmed, although the Appellate Division modified the sentences to run concurrently rather than consecutively, imposing a sentence of 25 years to life. *People v. Claudio*, 130 A.D.2d 759, 515 N.Y.S.2d 845 (2d Dept. 1987). Leave to appeal to the Court of Appeals was denied. *People v. Claudio*, 70 N.Y.2d 873, 523 N.Y.S.2d 501 (1987).

Federal Court Proceedings

On September 11, 1989, defendant filed a *pro se* petition in the United States District Court for the Eastern District of New York for a writ of *habeas corpus*, claiming *inter alia* that attorney Mark Heller's representation of him was so inadequate as to violate his federal and state constitutional rights to effective assistance of counsel. The District Court then appointed counsel, who asked the court to hold the federal petition in abeyance while he pursued a state remedy.

On April 4, 1991, defendant filed a petition for a writ of error *coram nobis* in the New York Court of Appeals. The petition alleged that attorney Albert Gaudelli had provided constitutionally deficient representation of defendant on the pretrial appeal to the Court of Appeals, because while Gaudelli had argued that Heller's representation at the pre-indictment stage had violated defendant's federal right to counsel, Gaudelli failed to argue that Heller's representation had violated defendant's right to counsel under the state constitution. On May 9, 1991, the petition was dismissed on the ground that there is no authority for such a writ in the Court of Appeals. *People v. Claudio*, 77 N.Y.2d 988, 571 N.Y.S.2d 899 (1991). On August 23, 1991, defendant submitted a memorandum to the District Court, pressing that same claim, among others.

The District Court denied the petition for a writ of *habeas corpus* on April 30, 1992, holding that Heller's representation could not have violated defendant's federal right to counsel, because that right had not yet attached when Heller represented

defendant and defendant made his statement. Pet. App. 39a. The Court held that Gaudelli could not have violated defendant's federal right to counsel by failing to claim that Heller violated defendant's state right to counsel, because that argument did not have a reasonable probability of success in the New York Court of Appeals. Pet. App. 42a-45a.

The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court, directing that court to grant the writ unless the state affords defendant an opportunity to present his state law claim to the state Court of Appeals within sixty days from the date of the mandate. The Court of Appeals held that Heller's representation could not violate defendant's federal right to counsel for the reason given by the District Court, but that Heller's representation probably did violate defendant's state right to counsel, and therefore Gaudelli was constitutionally deficient in failing to raise that state law claim on the pretrial appeal to the state Court of Appeals. *See Claudio v. Scully*, 982 F.2d 798 (1992); Pet. App. 1a. The Court of Appeals has stayed its mandate to permit petitioner to prepare and file this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Second Circuit in this case has expanded the reach of federal *habeas corpus* to claims of ineffective assistance of appellate counsel in two important respects. Each extension is unwarranted, and barred in this *habeas corpus* proceeding as a new rule by *Teague v. Lane*, 489 U.S. 288 (1989). More importantly, each extension will require the federal courts to review vast numbers of challenges to state criminal convictions that would have been barred under previously settled principles of law. Moreover, each extension increases not only the number of claims cognizable on *habeas corpus*, but also the degree to which the federal courts must engage in detailed analysis of

state law, second-guessing the judgment of state lawyers and state courts as to the content of state law.

First, the Second Circuit has created a major new exception to the rule of *Ross v. Moffitt*, 417 U.S. 600 (1974), which holds that the federal right to effective appellate counsel does not apply to second-level discretionary appeals. The new rule announced by the Second Circuit in this case would create an exception for pretrial appeals. This exception alone makes a substantial number of new counsel claims cognizable on *habeas corpus*, because pretrial appeals from rulings suppressing evidence or dismissing indictments are not at all unusual.

Moreover, the creation of one exception to the rule of *Ross* invites the creation of other exceptions, and threatens to undermine the sound principle that the federal constitutional right to effective appellate counsel extends only to the first appeal as of right, leaving to the states the supervision of counsel on subsequent state appeals. This Court should grant review to reaffirm the rule of *Ross*, reject the exception announced in this case, and discourage the creation of other exceptions to that rule.

Second, the Second Circuit has found a violation of the right of effective appellate counsel in the failure of counsel to raise a claim grounded entirely in state law, and seemingly foreclosed by several lines of state court authority. This ruling presents for this Court's review the question when, if ever, the failure to raise a state law claim can constitute a violation of the federal right to effective assistance of appellate counsel.

If federal courts are in fact to scrutinize the skill with which state appellate lawyers advance state law claims, then this Court should provide some guidance to prevent the excessive entanglement in state law that occurred in this case. For in this case, in order to find that appellate counsel was ineffective, the Second Circuit had to reject a decision of the state's intermediate appellate court in this case, distinguish a ruling of the

state's highest court on a similar issue in another case, and distinguish a line of state authority on the state law of appellate jurisdiction.

If claims of ineffective assistance of appellate counsel can be predicated on the failure to raise state law issues, then the federal courts will be asked to evaluate the merits of state law claims in virtually every state case. For any time the defendant or new counsel identifies a nonfrivolous issue that was not raised on the state appeal, it will be possible to characterize the omission of that issue as constitutionally deficient. The ruling of the Second Circuit invites state criminal defendants to make such claims, and this Court should grant review to establish guidelines that will confine federal court review of state law issues within reasonable bounds.

I. The Second Circuit Has Created A New And Unwarranted Exception For Pretrial Appeals To The Rule Of *Ross v. Moffitt*, 417 U.S. 600 (1974), Which Limits A Criminal Defendant's Federal Right To Appellate Counsel To The First Appeal As Of Right.

The Second Circuit held that defendant had a federal constitutional right to the effective assistance of counsel to pursue his pretrial discretionary appeal from the Appellate Division of New York State Supreme Court to the New York Court of Appeals. That determination contradicts established precedent from this Court that no federal right to counsel exists to pursue a second-level discretionary appeal, and that a criminal defendant has no right to the effective assistance of counsel where there is no right to counsel at all.

In *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court held unequivocally that the federal constitution does not require the states to provide a defendant with counsel to pursue a discretionary appeal from an intermediate appellate court to the state's highest court. This Court identified two reasons for dis-

tinguishing between a first appeal as of right, where the right to counsel applies, and a second-level discretionary appeal, where the right to counsel does not apply. First, defendant's need for counsel is much less acute on a second appeal, because the second appellate court has the benefit of the record and briefs of counsel prepared for the first appeal, together with the opinion of the first appellate court. 417 U.S. at 615. Second, a discretionary appeal ordinarily is intended not so much to ensure the correctness of the decision in the particular case, but rather to resolve legal questions of general significance. Because the appeal is not designed primarily to protect defendant's rights, and because he has no right to the appeal at all, it follows that he has no right to effective counsel in the pursuit of that appeal. 417 U.S. at 615.

The rule of *Ross v. Moffitt* has been consistently applied by this Court. *See, e.g., Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (no right to effective counsel on petition for certiorari to Florida Supreme Court); *Coleman v. Thompson*, 111 S.Ct. 2546, 2568 (1991) (no right to effective counsel on discretionary appeal from state *habeas corpus* proceeding).

The Second Circuit attempted to distinguish these cases in two respects, but neither distinction is sufficient to avoid the rule and the rationale of *Ross*. First, the Second Circuit noted that the appeal at issue here was taken pretrial rather than post-conviction, as in *Ross*, and therefore the Court thought the right to counsel should be governed not by *Ross* but by the question whether this pretrial proceeding constituted a "critical stage" in the proceedings, like the police-arranged lineup in *United States v. Wade*, 388 U.S. 218, 227 (1967), or the preliminary hearing in *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). 982 F.2d at 802-03; Pet. App. 11a-12a. But the rationale of *Ross* is applicable to any second-level discretionary appeal, whether it occurs before or after trial. In either case, the second appellate court has the benefit of the record, briefs, and opinion produced for the first appellate court. And in either case because the

defendant has no right to the second-level appeal at all, he has no right to counsel to pursue it.

Moreover, if it were appropriate to resolve the counsel issue by critical stage analysis, the analysis of the Second Circuit would still be flawed. That Court found that the second-level discretionary appeal was a critical stage because it was important to defendant, and indeed authorized the admission of a significant piece of evidence against him. That analysis cannot be correct. It is well settled that many events with major consequences for the criminal defendant are nevertheless not critical stages requiring counsel under the federal constitution. As the Court below recognized, the noncustodial questioning of defendant in this case was one such event, very important to defendant and resulting in a highly damaging piece of evidence against him, but still not a critical stage requiring counsel under the Sixth Amendment. So too the Court recognized that a post-trial discretionary appeal is not a critical stage requiring counsel, even though it may have consequences for defendant of the utmost importance. Thus, the importance of this defendant's pretrial discretionary appeal to the state Court of Appeals cannot suffice to make it a critical stage or to distinguish *Ross*, *Coleman*, and *Torna*.

The Second Circuit's second distinction is equally untenable. The Court quoted language from *Ross* to the effect that while trials are initiated by the prosecutor, appeals are ordinarily initiated by the defense, and thus the defendant needs an attorney on appeal not as a shield but as a sword. 417 U.S. at 610-11, quoted at 982 F.2d at 802-03; Pet. App. 12a-13a. The Court then noted that in this case the appellate process was initiated by the state, and therefore defendant needed counsel as a shield rather than as a sword.

This analysis takes the language of *Ross* out of context, and misapplies it to the facts of this case. First, *Ross* used the metaphor of sword and shield to argue generally that the defendant's claim of right to a lawyer is stronger at trial than on

appeal, because in general the lawyer acts as a shield at trial and as a sword on appeal. But *Ross* did not hold that the right to counsel exists if, and only if, counsel is needed as a shield. Indeed that principle is most certainly not the law, for it is clear that a defendant has a right to counsel on his first appeal as of right, where counsel is acting as a sword. It should likewise be clear under *Ross* that a defendant has no right to counsel on a second-level discretionary appeal, whether that second appeal is taken by defendant, as in this case, or by the People.

Indeed, even if the right to counsel on appeal were governed by the Second Circuit's sword-and-shield analysis, that analysis would not give defendant a right to counsel in the appeal to the New York Court of Appeals at issue here. For the appeal to the Court of Appeals in this case was taken not by the People but by defendant, and thus defense counsel was plainly acting as a sword and not a shield in pursuing that appeal. The Second Circuit apparently reasoned that because the first appeal was taken by the prosecution, the subsequent appeal taken by defendant became defensive rather than aggressive. But that is simply wrong. Defendant initiated this appeal to overturn the Appellate Division decision, just as a defendant who appeals after trial is seeking to overturn the decision of the trial court. If the right to counsel existed only in defensive proceedings, then it would not exist here.

In sum, the Second Circuit has created a major new exception to the rule of *Ross*. The exception for pretrial appeals created in this case will open the doors of the federal courts to a substantial number of new challenges to state criminal convictions, because pretrial appeals from rulings suppressing evidence or dismissing indictments are not at all unusual. Moreover, the creation of one exception to the rule of *Ross* invites the creation of other exceptions, and threatens to undermine the sound principle that the federal constitutional right to effective appellate counsel extends only to the first appeal as of right, leaving to the states the supervision of counsel on subsequent state appeals. Finally, the exception created by the Sec-

ond Circuit is wholly unprecedented, and therefore constitutes a "new rule," *see Butler v. McKellar*, 110 S.Ct. 1212, 1216 (1990), which could not properly be applied retroactively on *habeas corpus* review of a state criminal conviction. *Teague v. Lane*, 489 U.S. 288 (1989).

This Court should grant review to reaffirm the rule of *Ross*, reject the novel and unwarranted exception announced in this case, and discourage the creation of other exceptions to the rule.

II. The Decision Below Raises The Important Questions Whether The Federal Right To Effective Appellate Counsel May Ever Be Violated By Counsel's Failure To Raise A State Law Issue On A State Appeal, And If So, What Guidelines Will Protect The Federal Courts From The Excessive Entanglement In State Law That Occurred Here.

The Second Circuit in this case held, without any precedent from this Court or any other federal court, that an appellate lawyer was constitutionally ineffective for failing to raise a state law claim in a state appellate court. That ruling constitutes an unwarranted expansion of federal *habeas corpus* jurisdiction and for that reason warrants this Court's review.

The cases cited by the Second Circuit in support of its ruling on this point, 982 F.2d at 805 n. 5; Pet. App. 13a, simply do not support it. In each of the four cases cited by the Second Circuit, the omitted claims had roots in federal as well as state law; moreover, in two of the four cases, the court concluded that the omission was reasonable and hence did not establish a violation of the right to counsel.[1] Likewise in *Smith v. Murray*, 477 U.S.

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1 In *Miller v. Keeney*, 882 F.2d 1428, 1435 (9th Cir. 1989), appellate counsel had failed to make a claim based on the right to counsel and the right against compulsory self-incrimination; the omission was held reasonable. In *Parton v. Wyrick*, 704 F.2d 415, 416-17 (8th Cir. 1983), appellate counsel had failed to challenge the

527, 531, 536 (1986), the claim omitted on the state appeal was federal in nature, and in any event this Court held that the omission was reasonable.

Thus, neither this Court nor any other Circuit has ever held unequivocally that the federal right to effective counsel is violated by the failure to raise on appeal an issue that is wholly grounded in state law. That ruling of the Second Circuit in this case is sufficiently novel and unprecedented that it warrants this Court's review; moreover, because it is wholly unprecedented, it constitutes a new rule barred on *habeas corpus* by *Teague v. Lane*, 489 U.S. 288 (1989).

Moreover, if ever the federal right to counsel can be violated by the failure to raise a state law claim on appeal, this is not such a case. For such a violation should not be found when the ruling requires the federal court to engage in the elaborate inquiry into state law that was necessary in this case.

In order to conclude that omission of the state law claim in this case was constitutionally deficient, the Second Circuit had to hold that any reasonably competent appellate lawyer would have ignored three major obstacles to pressing the claim in the

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trial court's denial of defendant's motion for self-representation; the omission was held reasonable. *Nero v. Blackburn*, 597 F.2d 991, 993-94 (5th Cir. 1979), dealt with an omission by trial counsel rather than by appellate counsel; the trial lawyer rendered ineffective assistance when he disclosed the existence of defendant's criminal record on summation, and then failed to ask for a mistrial when the prosecutor responded by elaborating on the record in his summation. While *Nero* is characterized by both the majority and the dissent below as involving a pure issue of state law, federal due process would seem to be implicated as well as state law by summations which invite the jury to consider highly prejudicial matter not in evidence. Finally, in *Lafosse v. Walters*, 585 F.Supp. 1209 (S.D.N.Y. 1984), the issues omitted by appellate counsel were not specified by the court, and thus the opinion cannot be said to stand for the proposition that omitting state issues constitutes a violation of the federal right to counsel.

state Court of Appeals: an unequivocal ruling of the state intermediate appellate court in this case, a subsequent ruling of the state Court of Appeals in another case, and a line of state cases establishing that the claim was barred by a state rule of appellate jurisdiction. As a result, the opinion below contains a detailed exigesis of state law, which rejects and distinguishes those three separate bodies of state law, and asserts an authority superior to that of the state courts in construing state law.

A. Appellate Counsel Was Entitled To Rely On The Decision Of The Appellate Division Rejecting The State Constitutional Claim In This Case.

First, the Second Circuit dismissed the analysis of the Appellate Division in this case, rejecting the state constitutional claim. The Appellate Division had concluded that while New York law recognizes a limited right to counsel prior to the commencement of judicial proceedings, that right guarantees only that a defendant will not be questioned in the absence of counsel retained on the case, and does not guarantee that the performance of counsel prior to indictment will satisfy any particular standard of competence. 85 A.D.2d at 254-60, 447 N.Y.S.2d at 978-82; Pet. App. 70a-77a. The Second Circuit concluded that the Appellate Division had incorrectly interpreted a decision of the New York Court of Appeals, and had made a distinction between the right to counsel and the right to effective counsel that had no basis in New York state law. 982 F.2d at 804-05; Pet. App. 17a-18a.

But surely the intermediate appellate courts of New York are more expert than the Second Circuit in construing decisions of the New York Court of Appeals. Indeed, this Court has expressly held that an announcement of state law by an intermediate state court must be accepted by the federal courts, in the absence of convincing evidence that the law of the state is otherwise. *Six Companies of California v. Joint Highway Department*, 311 U.S. 180, 188 (1940); *accord*, *West v. American Telephone and Telegraph*, 311 U.S. 223, 236-38 (1940) (federal court may not reject state rule announced in interme-

diate appellate court merely because it thinks principle is unsound and another is preferable). The Appellate Division's interpretation of state law was an authoritative determination of state law on the very facts of this case, and was entitled to deference in the federal courts.

Moreover, whether or not the Appellate Division was ultimately correct, appellate counsel was surely entitled to rely on its interpretation of state law in deciding what claims to press on appeal. Appellate counsel must be permitted to rely on existing state court precedent without fear that a federal court will subsequently find the state court decision unpersuasive and therefore find appellate counsel ineffective. As Judge Newman correctly observed in dissent below, an appellate lawyer should not be found constitutionally deficient for electing to omit on appeal to a state's highest court a state claim that has been rejected on the merits by the state's intermediate appellate court, at least in the absence of some intervening contradictory ruling from the state's highest court. 982 F.2d at 811; Pet. App. 32a.

B. Appellate Counsel Was Entitled To Rely On A Decision Of The New York Court Of Appeals In Another Case, Issued After The Appellate Division Opinion And Before The Brief In This Case Was Filed In The New York Court Of Appeals.

Seven months after the Appellate Division decision in this case, and before defendant filed his brief in the state Court of Appeals, the Court of Appeals decided the case of *People v. Beam*, 57 N.Y.2d 241, 455 N.Y.S.2d 575 (1982), recognizing precisely the distinction between the right to counsel and the right to effective counsel that seemed so untenable to the Second Circuit. In *Beam*, the Court held that prior to commencement of judicial proceedings but after the state right to counsel attaches, the state constitution guarantees that a defendant will not be questioned in the absence of his attorney unless he chooses to waive that right, but it does not guarantee that an attorney's advice to waive the right to silence and to

counsel must be good advice. 57 N.Y.2d at 253, 455 N.Y.S.2d at 581. That decision strongly supported the decision of the Appellate Division in this case, which rested on a similar distinction.

The Second Circuit devoted several pages to distinguishing *Beam*, and stated that only a confused analysis of *Beam* would find support in that case for the Appellate Division's decision. 982 F.2d at 803-04; Pet. App. 17a. A reasonably competent attorney, however, could conclude that *Beam* was wholly consistent with the Appellate Division's decision in this case, and that it was futile to seek to overturn that decision in the state Court of Appeals.

The error of the Second Circuit's approach is apparent from its heavy reliance on what it perceived to be the general tenor of the New York courts' treatment of state constitutional right to counsel claims. 982 F.2d at 803; Pet. App. 14a. Having observed correctly that the New York courts are generally more hospitable to such claims than the federal courts, the Second Circuit jumped to the conclusion that the New York courts would have been hospitable to this particular claim, despite the contrary evidence from the Appellate Division and from *Beam*. It cannot be the law that the federal courts can brand a lawyer incompetent for being guided by state court precedents rather than by the general impression of state law held by the federal courts.

C. Appellate Counsel Was Entitled To Rely On An Established Rule Of State Appellate Jurisdiction That Would Have Precluded The New York Court Of Appeals From Reaching The Merits Of The State Law Claim.

The proceeding at which appellate counsel was allegedly ineffective was a pretrial appeal challenging a pretrial suppression ruling. The trial court had suppressed the defendant's confession, the Appellate Division had reversed that decision on the People's appeal, and the defendant sought to reinstate

the suppression order on a further appeal to the New York Court of Appeals, taken as a matter of discretion and not as a matter of right. State law provides that on the first appeal the only issue properly presented was the issue decided adversely to the People by the trial court. N.Y. Crim. Proc. Law § 470.15(1). On the further appeal to the Court of Appeals the only issues properly presented were the issue decided by the Appellate Division as the basis for reversal, and any other claim of error in the trial court adversely affecting the People (which might thus provide an alternate ground of affirmance). N.Y. Crim. Proc. Law § 470.35(2).

At least three decisions of the New York Court of Appeals, construing these rules, have held that the only issue reviewable on a pretrial appeal from a suppression ruling or a dismissal of an indictment is the issue that constituted the basis for the trial court's suppression or dismissal. *See People v. Karp*, 76 N.Y.2d 1006, 1009, 565 N.Y.S.2d 751 (1990); *People v. Cade*, 74 N.Y.2d 410, 418, 547 N.Y.S.2d 137, 141 (1989); *People v. Goodfriend*, 64 N.Y.2d 695, 697-98, 485 N.Y.S.2d 519, 521 (1984).

In this case, the state trial court had suppressed defendant's confession solely on the basis of the federal costitutional right to counsel, and not on the basis of the state right to counsel. Thus under state law the only issue reviewable on the People's appeal to the Appellate Division was the federal constitutional claim, and the state constitutional claim was barred. On defendant's appeal to the Court of Appeals, the only reviewable issue was again the federal constitutional claim.

Reasonably competent appellate counsel would thus have concluded that the state constitutional claim was beyond the power of the state Court of Appeals to review.

The Second Circuit found several reasons for ignoring the state procedural bar, *see* 982 F.2d at 803 n.7; Pet. App. 14a, but none has any basis in state law. First, the Second Circuit observed that the Appellate Division had addressed the state

law claim, apparently inferring from this that the issue was not barred by Crim. Proc. Law § 470.15(1). The inference is simply incorrect. The Appellate Division frequently comments in dicta on issues not properly before it for review, and hence not reviewable in the Court of Appeals. It does so for the guidance of the lower courts. *See, e.g., Holtzman v. Hellenbrand*, 92 A.D.2d 405, 406 N.Y.S.2d 591 (2d Dept. 1983) (holding case not properly before the court on interlocutory review by way of mandamus, but nevertheless approving in dicta the rule of *United States v. Mastrangelo*, 662 F.2d 946 [2d Cir. 1981], *cert. denied*, 456 U.S. 973 [1982]).

Second, the Second Circuit observed that the People had addressed the state law claim in their brief to the Court of Appeals. But the fact that the People offered a defense of the Appellate Division's dicta as well as its holding does not confer jurisdiction on either court to decide that issue. *See Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 55, 467 N.Y.S.2d 182, 186 (1983) (parties may not confer jurisdiction on court by waiving procedural irregularities).

Third, the Second Circuit created an exception to the bar, finding that New York state appellate courts could reach an issue that was not the basis for the suppression order, if that issue was "strongly related [to the issue that was the basis for the order] and based on the same set of facts." That is to say, according to the Second Circuit, on an appeal from a suppression order based on a violation of the federal right to counsel, the appellate courts of New York can consider whether there is also a violation of the independent state right to counsel.

That argument, however, ignores the well-settled principle of New York law that state and federal constitutional claims are conceptually distinct, and must be separately raised and decided. In New York, a defendant does not preserve a state constitutional claim for review by raising the analogous federal constitutional claim. *People v. Robinson*, 74 N.Y.2d 773, 775, 545 N.Y.S.2d 90, 91, *cert. denied*, 493 U.S. 966 (1989) (Fourth

Amendment challenge to search incident to car stop does not preserve state constitutional claim). Nor does a defendant preserve a federal constitutional claim by raising the analogous state constitutional claim. *People v. Middleton*, 54 N.Y.2d 42, 48-49, 444 N.Y.S.2d 581, 583-84 (1981) (state constitutional challenge to court order for impression of defendant's teeth does not preserve Fourth Amendment claim).

It defies logic to suppose the New York Court of Appeals would require separate treatment of state and federal constitutional claims in the context of the preservation rule, but not in construing the rule of Crim. Proc. Law § 470.15(1), when both rules operate in similar fashion to limit appellate jurisdiction to the issues raised or decided below. The well-settled state requirement that state and federal constitutional claims must be separately raised and decided flatly bars the Second Circuit's theory that state and federal constitutional claims are so closely related as to make separate treatment of them unnecessary under Crim. Proc. Law § 470.15(1).

Indeed, in this very case the New York Court of Appeals declined to adopt the Second Circuit's view that the state and federal constitutional claims were "strongly related issues" that did not require separate treatment. The New York Court of Appeals expressly declined to consider the state constitutional issue on the pretrial appeal in this case because "[d]efendant does not claim before this court, nor did he do so at the suppression hearing or before the Appellate Division, that his right to counsel under the State Constitution has been violated." 59 N.Y.2d at 560 n.1; Pet. App. 57a. That statement may invoke the bar of Crim. Proc. Law § 470.15(1), because defendant did not raise the state constitution in the suppression court; the statement may also invoke a bar to considering *sua sponte* issues not raised by the parties in the Court of Appeals. On either view, however, the Court of Appeals unequivocally held that by presenting the federal constitutional claim in this case defendant did not also present the state constitutional claim to any court.

Any reasonably competent New York appellate attorney would be familiar with the view of the New York Court of Appeals that federal and state constitutional claims are conceptually distinct and must be separately raised. Thus, reasonably competent counsel in this case would have concluded that the suppression order resting on federal constitutional grounds did not present a state constitutional claim for appellate review. Appellate counsel cannot be deemed ineffective for omitting a claim that was procedurally barred.

In sum, the Second Circuit has announced a new rule requiring federal courts to scrutinize the skill with which state appellate lawyers select and advance state law claims. That rule opens the federal courts to a substantial number of new challenges to federal convictions, and it draws the federal courts into excessive entanglement with state law.

If claims of ineffective counsel can be predicated on the failure to raise state law issues, then the federal courts will be asked to evaluate the merits of state law claims in virtually every state case. For any time either the defendant or new counsel identifies a nonfrivolous issue that was not raised on the state appeal, it will be possible to characterize the omission of that issue as constitutionally deficient.

Not only will these claims be numerous, but they will draw the federal courts into excessive and inappropriate entanglement in state law, as occurred in this case. For in reviewing appellate counsel's performance here, the Second Circuit asserted authority superior to that of state attorneys and the state courts in construing state law. In particular, the Second Circuit rejected a decision of the state's intermediate appellate court in this case, distinguished a ruling of the state's highest court on a similar issue in another case, and distinguished a line of state authority on the state law of appellate jurisdiction.

This Court should grant review to determine whether the failure to raise a state law claim on a state appeal can constitute a violation of the federal right to effective assistance of appel-

late counsel and, if so, to provide guidance that will limit the scope of federal review of such claims, and protect the lower federal courts from the excessive entanglement in state law that occurred in this case.

CONCLUSION

The Second Circuit in this case has extended the reach of federal *habeas corpus* to claims of ineffective assistance of appellate counsel in two important respects. First, it has extended the right to counsel to certain second-level discretionary appeals. Second, it has found a violation in the omission of a state law claim that is contrary to substantial state law precedent. Each extension alone is worthy of this Court's review. Together, the rulings create the potential for a massive and unwarranted expansion of federal court supervision of the state appellate process. Supervision of the state appellate process tends to draw the federal courts ever deeper into the business of reviewing claims of state law. This Court should grant the writ of certiorari to establish appropriate limits on the role of the federal courts in supervising state appeals.

Respectfully submitted,

RICHARD A. BROWN
District Attorney, Queens County

BARBARA D. UNDERWOOD*
JOHN M. CASTELLANO
Assistant District Attorneys

Queens County District Attorney's Office
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-6314

**Counsel of Record for the Petitioner*

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